IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-793

PEGGIE ANN KING, BARBARA JENKINS, AND IRENE COMBS,

Petitioners,

v.

PUBLIC SERVICE EMPLOYEES LOCAL UNION 572 OF THE LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO, GEMINI FOOD SERVICES, INC., ERNEST MCNEAL, AND SIDNEY C. RAGLAND,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION

ROBERT J. CONNERTON
ARTHUR M. SCHILLER
JULES BERNSTEIN
ORRIN BAIRD
905 - 16th Street, N.W.
Washington, D.C. 20006
(202) 737-8320

NORMAN OLITSKY
MARCIA L. L. OLITSKY
814 Citizens Trust Building
Portsmouth, Virginia 23704
(804) EX 7-1281

Counsel for Respondent Local Union 572

3 3 PRINTED IN U.S.A.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-793

PEGGIE ANN KING, BARBARA JENKINS, AND IRENE COMBS,

Petitioners,

v.

PUBLIC SERVICE EMPLOYEES LOCAL UNION 572 OF THE LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO,
GEMINI FOOD SERVICES, INC., ERNEST MCNEAL, AND SIDNEY C. RAGLAND,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF IN OPPOSITION

OPINIONS BELOW

The opinion of the district court is reported at 438 F.Supp. 964. The opinion of the Fourth Circuit is reported at 562 F.2d 297. The district court granted a motion for judgment on the pleadings. The court of appeals affirmed. The opinions of the district court and the court of appeals appear in the Appendix to the Petition, pp. 7a *et. seq.*

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Whether the Federal Assimilative Crimes Act, 18 U.S.C. § 13, incorporates the Virginia "right-to-work" laws into federal law which is applicable on federal enclaves subject to exclusive federal legislative jurisdiction.

STATUTES INVOLVED

The statutes involved are adequately set forth in the Petition.

STATEMENT OF THE CASE

Solely for the purposes of respondent union's Opposition to the Petition For a Writ of Certiorari in this case, the following facts may be assumed as true:

The respondent employer is engaged in food service and related business activities as a federal government contractor at Fort Monroe, Virginia. Fort Monroe is a federal enclave subject to exclusive federal legislative jurisdiction within the meaning of Article I, § 8, Clause 17, of the United States Constitution [1] and is within the coverage of the Federal Assimilative Crimes Act, 18 U.S.C. § 13.[2]

Since on or about July 1, 1975, respondent employer has

[1] "The Congress shall have Power . . . [t]o exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States. . . . [A]nd to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings. . . ."

[2] Appendix to the Petition, p. 1a.

been party to a collective bargaining agreement with respondent union which has governed the terms and conditions of employment of employees of the employer, including petitioners. Article III of the agreement provides that all employees coming under the terms of the agreement may be required to join the union within thirty days after employment or within thirty days after the signing of the agreement, whichever is later, as a condition of continued employment.

Since July 1, 1975, the respondent employer has threatened petitioners with loss of employment for failure to join respondent union by paying dues therein in accordance with the provisions of Article III of the aforementioned agreement. As a result of such threatened loss of employment, petitioners, other than petitioner King, paid the requisite dues to respondent union contrary to their personal wishes. In addition, on or about October 17, 1975, respondent employer discharged petitioner King because of her refusal to do likewise.

ARGUMENT

1. *The Decisions of the Courts Below Were Correct*

The District Court for the Eastern District of Virginia held that the Virginia "right-to-work" laws are not incorporated by the Federal Assimilative Crimes Act because the policy of the Virginia statute conflicts with federal law. Appendix to Petition, p. 10a. The United States Court of Appeals for the Fourth Circuit affirmed for the reasons stated in the district court's opinion, Appendix to Petition, p. 8a.

While the Federal Assimilative Crimes Act has served to fill gaps in federal criminal law, it is well settled that it may not be applied so as to establish federal crimes based on state statutes which are contrary to federal policy. *Williams* v. *United States*, 327 U.S. 711, 717-24 (1946); *Stewart*

& Co. v. *Sadrakula,* 309 U.S. 94, 103-104 (1940); *United States* v. *Warne,* 190 F.Supp. 645, 658 (N.D. Cal. 1960); *Air Terminal Services, Inc.* v. *Rentzel,* 81 F.Supp. 611, 612 (E.D. Va. 1949). The legislative and judicial treatment which the union security issue has received since the enactment of the National Labor Relations Act (hereinafter "NLRA") in 1935 makes very evident that there exists a conflict between federal policy and Virginia law which precludes the application of the Virginia "right-to-work" laws to federal enclaves.

In passing Section 8(a)(3) of the NLRA, 29 U.S.C. § 158 (a)(3),[3] Congress legislated in the area of union security by providing "[t]hat nothing in this Act or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein. . . ." In interpreting this provision this Court has said that Section 8(3) of the Wagner Act, the immediate antecedent of Section 8(a)(3), disclaims

> [A] national policy hostile to the closed shop or other forms of union security agreement. This is the obvious inference to be drawn from the choice of the words "nothing in this Act . . . or in any other statute of the United States," and it is confirmed by the legislative history.

Algoma Plywood & Veneer Co. v. *Wisconsin Employment Relations Board,* 336 U.S. 301, 307 (1949).

Even though in 1947 Congress passed Section 14(b) of the NLRA, 29 U.S.C. § 164(b),[4] which expressly authorized the exercise of state power to prohibit union security agreements within the areas of state sovereignty, Congress as a

[3] Appendix to Petition, p. 2a.

[4] Appendix to Petition, p. 3a.

matter of federal policy has continued to favor the union shop.[5]

However, federal policy does much more than merely authorize the union shop. Under Section 8(a)(5) of the NLRA, 29 U.S.C. § 158(a)(5), employers are under a statutory obligation to bargain concerning union security. *NLRB* v. *General Motors Corp.,* 373 U.S. 734 (1963); *NLRB* v. *Andrew Jergens Co.,* 175 F.2d 130 (9th Cir. 1949), *cert. denied,* 338 U.S. 827 (1949). Section 8(a)(3) of the NLRA has been interpreted to permit the requiring of paying union dues. *NLRB* v. *General Motors Corp., supra; Radio Officers Union* v. *NLRB,* 347 U.S. 17, 40-41 (1954); *NLRB* v. *Hershey Food Corp.,* 513 F.2d 1083, 1085 (9th Cir. 1975); *McDowell* v. *Clement Bros. Co.,* 260 F.Supp. 817, 819 (N.D. Ga. 1966). In addition, under Section 301(a) of the NLRA, 29 U.S.C. § 185(a), the federal courts are available to parties seeking to enforce union shop agreements. *Modine Mfg. Co.* v. *Grand Lodge,* 216 F.2d 326, 328 (6th Cir. 1954); *Burlesque Artists Ass'n* v. *I. Hirst Enterprises,* 134 F.Supp. 203 (E.D. Pa. 1955); *See Burlesque Artists Ass'n* v. *I. Hirst Enterprises,* 267 F.2d 414 (3rd Cir. 1959).

Hence, it is clear that "Congress [has undertaken] pervasive regulation of union-security agreements," *Retail Clerks Int'l Ass'n* v. *Schermerhorn,* 375 U.S. 96, 100 (1963), and that such regulation runs directly counter to the thrust of the Virginia "right-to-work" laws which prohibit union security agreements in their entirety.

However, even beyond the rationale of the court of appeals and district court, the language and legislative history of Section 8(a)(3) of the NLRA, as amended, preclude assimilation of the Virginia "right-to-work" laws into federal law. In Section 8(a)(3) Congress prohibited reliance

[5] See 1951 amendments to the Railway Labor Act, 45 U.S.C. § 152, par. 11; 1959 amendments to NLRA, Section 8(f), 29 U.S.C. § 158(f).

upon any other federal statute to undermine the normal application of Section 8(a)(3) which authorizes union shop agreements. Section 8(a)(3) declares that no language "in any other statute of the United States" shall preclude the making of union shop agreements. This legislative command is both clear and unequivocal.

The legislative history of Section 8(3) of the Wagner Act of 1935 (NLRA), the immediate antecedent of Section 8(a)(3), makes eminently clear that Congress deliberately inserted the foregoing language to expressly preclude the possibility that courts or governmental agencies might interpret the provisions of other federal laws, such as the Federal Assimilative Crimes Act, so as to frustrate the policy of permitting union shop agreements.[6]

Therefore, the conclusion is abundantly clear that Section 8(a)(3) stands as an absolute bar to any effort to rely upon the Federal Assimilative Crimes Act as a device to frustrate the federal policy which authorizes the negotiation of union shop agreements.

2. *There is No Conflict Among the Circuits*

The United States Court of Appeals for the Fourth Circuit is the first and only circuit court to reach the issue presented herein. Furthermore, the only other reported decisions on the issue agree with the Fourth Circuit's ruling. *See Cooper* v. *General Dynamics*, 378 F.Supp. 1258 (N.D. Tex. 1974), *rev'd in part on other grounds*, 533 F.2d 163 (5th Cir. 1976), *cert. denied sub nom. International Association of Machinists* v. *Hopkins*, 45 U.S.L.W. 3840 (1977); *Vincent* v. *General Dynamics Corp.*, 427 F.Supp. 786 (N.D. Tex. 1977).

---

[6] *See 1 Legislative History of the National Labor Relations Act*, pp. 16, 1319 and 1322, 73d Cong., 2d Sess. (G.P.O. 1935); *2 Legislative History of the National Labor Relations Act*, pp. 2290, 2321-2325, and 3069, 73d Cong., 2d Sess. (G.P.O. 1935).

3. *The Decision Below Does Not Conflict With any Decision of this Court*

Our argument above and the Memorandum Opinion of the district court makes abundantly clear that not only does the court of appeals decision not conflict with any decision of this Court but that the case law in this Court mandates the decision by the court of appeals. Petitioners have attempted to create an illusion of conflict by relying on *dicta* in various decisions of this Court. However, the cases cited by petitioners leave no doubt that petitioners' alleged conflicts have simply been manufactured for the purposes of their Petition and are an insufficient ground for granting a Writ of Certiorari.

Petitioners first claim that the court of appeals decision conflicts with this Court's decision in *Hancock* v. *Train*, 426 U.S. 167 (1976). Not only is there no conflict between the decisions but, in fact, the *Hancock* decision supports the holding of the court of appeals. In *Hancock*, this Court held that state law applies to federal installations and activities only where there is a "clear and unambiguous" congressional mandate which authorizes state regulation. *Id.*, at 179. Not only did the court of appeals and the district court find no such mandate, but the court of appeals found that, in fact, the Virginia "right-to-work" laws were in conflict with the federal law. Appendix to Petition, pp. 8a and 11a.

Petitioners also claim that the decision below conflicts with this Court's decision in *Howard* v. *Commissioners of Sinking Fund*, 344 U.S. 624 (1953). In *Howard*, this Court held that even though a municipality could annex a federal enclave, exclusive jurisdiction over the enclave remains with the federal government unless modified by a federal statute. In *Howard*, this Court found that there was a federal statute—the Buck Act, 4 U.S.C. §§ 105-110—which permitted a municipality to levy a license fee on employees working on a federal enclave. However, unlike the Buck Act, Section 14(b) of NLRA does not modify federal jurisdiction. It

simply permits states to legislate their own policies as to union shop agreements in their own jurisdictions free of federal pre-emption. Thus, there is no conflict between *Howard* and the decision of the court of appeals below.

Next petitioners argue that the decision below is not in conformity with this Court's decision in *United States* v. *Sharpnack,* 355 U.S. 286 (1958). There this Court held that the Federal Assimilative Crimes Act, as amended in 1948, was constitutional insofar as it made applicable to a federal enclave a subsequently enacted criminal law of the state in which the enclave was situated. The court of appeals here did not question the constitutionality of the Federal Assimilative Crimes Act but rather held that Virginia's "right-to-work" laws were not incorporated by the Federal Assimilative Crimes Act because the policy of the Virginia statute conflicts with federal law. Appendix to Petition, p. 10a. Thus any conflict between the instant case and *Sharpnack* is simply illusory.

Petitioners also argue that this Court's decision in *Oil, Chemical & Atomic Workers* v. *Mobil Oil Corp.,* 426 U.S. 407 (1976), dictates that the Virginia "right-to-work" laws be applied to any employee working within the boundaries of the State of Virginia and thus conflicts with the court of appeals decision. However, this Court's holding in *Mobil Oil* was simply that "§ 14(b) [of the Taft-Hartley Act] does not allow enforcement of right-to-work laws with regard to an employment relationship whose principal job situs is outside of a state having such laws." 426 U.S. at 418. The question in *Mobil Oil* was whether Texas' "right-to-work" law should be applied to seamen whose predominate job situs was at sea outside the territorial jurisdiction of Texas. The case did not attempt to deal with the Plenary Powers Clause of the Constitution[7] which gives Congress exclusive legislative authority over federal enclaves pur-

[7] Art. I, § 8, cl. 17. Fn. 1, *supra.*

chased with the consent of a state. Thus Virginia's "right-to-work" laws may be applied to a federal enclave only through incorporation by the Federal Assimilative Crimes Act. *See, People of Puerto Rico* v. *Shell Co.,* 302 U.S. 253, 266 (1937). However, the court of appeals below ruled that the Federal Assimilative Crimes Act does not incorporate the Virginia statute. Therefore, there is no conflict between the decisions.

Finally, petitioners contend that the decision below conflicts with this Court's decision in *Algoma Plywood and Veneer Company* v. *Wisconsin Employment Relations Board, supra,* and *Retail Clerks Int'l. Assn'n.* v. *Schermerhorn,* 373 U.S. 746 (1963), *reargued,* 375 U.S. 96 (1963). In those cases, this Court held that under the NLRA states are free to regulate union-security and agency-shop agreements as they see fit. Neither respondent nor the courts below take issue with that holding. However, this Court's holdings in *Algoma Plywood* and *Schermerhorn* are inapposite where the state is without jurisdiction. *See Oil, Chemical & Atomic Workers* v. *Mobil Oil, supra,* 426 U.S. at 420. Therefore, in the instant case which involves a federal enclave upon which the state has no power to legislate, the *Algoma Plywood* and *Schermerhorn* decisions do not apply and thus there is no meaningful conflict between those decisions and the decision of the court of appeals below.

CONCLUSION

For the reasons set forth herein, respondent prays that the Petition for a Writ of Certiorari filed herein be denied.

Respectfully submitted,

ROBERT J. CONNERTON
ARTHUR M. SCHILLER
JULES BERNSTEIN
ORRIN BAIRD
905 - 16th Street, N.W.
Washington, D.C. 20006
(202) 737-8320
NORMAN OLITSKY
MARCIA L. L. OLITSKY
814 Citizens Trust Building
Portsmouth, Virginia 23704
(804) EX 7-1281
Counsel for Respondent Local Union 572

By .....
JULES BERNSTEIN

CERTIFICATE OF SERVICE

This is to certify that copies of the foregoing Brief in Opposition were served by first-class mail, postage prepaid, this 25th day of January, 1978, upon the following:

JAMES NEWTON WILHOIT, III, *Esq.*
REX H. REED, *Esq.*
MILTON L. CHAPPELL, *Esq.*
National Right-to-Work Legal Defense Foundation
8316 Arlington Blvd.
Suite 600
Fairfax, Virginia 22038

STEPHEN M. SMITH, *Esq.*
JOSEPH SMITH, LTD.
P.O. Box 1437
Hampton, Virginia 23661

.....
JULES BERNSTEIN